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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/678,580	10/03/2000	Daniel A. Japuntich	48317US030	7366

32692 7590 07/31/2007  
3M INNOVATIVE PROPERTIES COMPANY  
PO BOX 33427  
ST. PAUL, MN 55133-3427

EXAMINER
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DIXON, ANNETTE FREDRICKA

ART UNIT	PAPER NUMBER
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3771

NOTIFICATION DATE	DELIVERY MODE
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07/31/2007

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 09/678,580  
Filing Date: October 03, 2000  
Appellant(s): JAPUNTICH ET AL.

**MAILED  
JUL 27 2007  
GROUP 3700**

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Karl G. Hanson  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed April 16, 2007 appealing from the Office action mailed August 24, 2006.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings, which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

Please note: Appellant cited a Notice of Appeal in copending application 09/680,465; however no Appeal Brief was filed.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is incorrect. A correct statement of the status of the claims is as follows:

This appeal involves claims 34-56, 58, and 60-87.

Claims 1-33 and 59 been canceled.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct. However, Examiner would like to inform the Appellant of a minor typographical error. Specifically, on page 4 and page 5 Appellant lists a tabular analysis for independent claim 66. From a close reading of the Appeal Brief, Examiner believes the tabular analysis listed on page 5 should be listed as independent claim 68.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

2072516	SIMPSON	10-1981
0252890	SODERBERG	1-1988
1701277	SHINDEL	2-1929
2105183	COVER	1-1938

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

***Claim Rejections - 35 USC § 103***

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. Claims 68,34-36,50-56,58,60-75,76-82, are rejected under 35 U.S.C. 103(a) as being unpatentable over Simpson et al. ('516) in view of Soderberg (EP 0 252 890) and Shindel ('277).

As to claim 68, Simpson et al. disclose a filtering face mask that comprises: a mask body (1,2) that is adapted to fit over the nose and mouth of a wearer (fig.1); and an exhalation valve (fig.2) that is attached to the mask body, the exhalation valve comprising: a valve seat that comprises: a seal surface; an orifice (16) that is circumscribed by the seal surface; and a flap-retaining surface (portion abutting retainer 17); and a single flap (15) that has a stationary portion and only one free portion and a peripheral edge (i.e. the edge of the valve flap 15 as illustrated in fig.2 of Simpson et al. is readable upon the recited peripheral edge) that extends 360 degrees about the flap and that includes a stationary segment and a free segment, the stationary segment of the peripheral edge being associated with the stationary portion of the flap so as to remain at rest during an exhalation, and the free segment being associated with the one free portion of the flexible flap so as to be lifted away from the seal surface during an exhalation, the free segment also being located below the stationary segment when the filtering face mask is worn on a person and viewed from the front (i.e. fig.1 of Simpson et al. illustrates the face mask angled downwardly when donned; consequently, the free portion of valve flap 15 would be positioned below the stationary segment). (page 2, lines 37-50). The flexible flap of Simpson et al. is positioned on the valve seat such that the flap is pressed towards the seal surface in an abutting relationship therewith when fluid is not passing through the orifice (page 2, lines 41-50). To the extent, if any, that the flap of Simpson et al. may not be pressed towards the seal surface in an abutting relationship therewith when fluid is not passing through the orifice resort is had to Soderberg (page 4, lines 17-23), in a face mask having an exhalation valve that is

pressed towards the valve seal surface in an abutting relationship therewith, when fluid is not passing through the orifice for the purpose of ensuring and maintaining a seal between the exhalation valve and the valve seat.

It would have been obvious to modify the exhalation valve of Simpson et al. to be pressed towards the valve seat in an abutting relationship therewith when fluid is not passing through the orifice because it would have ensured and maintained a seal between the valve flap and seat as taught by Soderberg.

The difference between Simpson et al. and claim 68 is a valve cover that is disposed over the valve seat and that comprises a surface that holds the flexible flap against the flap-retaining surface in a location and position relative to the seal surface such that the flap is pressed towards the seal surface in an abutting relationship therewith when a fluid is not passing through the orifice under any orientation of the valve, the point where the flexible flap is mechanically held against the flap retaining surface being located off center relative to the flap.

Shindel (col.2, lines 59-66) teaches a valve securing device in the form of a valve cover (7) that is disposed over the valve seat and that comprises a surface (14) that mechanically holds flexible flap (6) against the flap retaining surface (5) in an abutting relationship therewith when a fluid is not passing through the orifice under any orientation of the valve, the point where the flexible flap is mechanically held against the flap retaining surface being located off center (fig.2) relative to the flap. Shindel cites the advantages of simplicity of arrangement and ready removability of the cover when desired which would allow for replacement and/or cleaning of the valve and orifices.

It would have been obvious to modify the manner of attachment of the exhalation valve of Simpson et al. as modified by Soderberg to employ a cover over the valve seat because it would have provided a simple arrangement with ready removability of the cover when desired and because it would have provided protection for the exhalation valve as taught by Shindel and because Simpson et al. as modified by Soderberg teach the valve flap may be mounted to the valve seat in a variety of well known ways including clamping (page 5, line 30-page 6, line 3 of Soderberg).

As to claims 34 and 35, the particular material from which the valve seat of Simpson et al. is made and the manner of making the valve seat can be arrived at through mere routine obvious experimentation and observation with no criticality seen in any particular material including plastic material. It is noted that Simpson et al. (page 2, line 39) discloses the valve flap being made from a plastic material. Consequently, it is submitted that it would have been obvious to make the valve seat from any well known material (e.g. plastic) having known physical characteristics to achieve an expected result (i.e. physical cooperation of like plastic materials).

As to claim 36, the seal (fig.2) of Simpson et al. is illustrated as being substantially uniform and since the flexible flap (15) of Simpson et al. is disclosed as being made from plastic and since known physical characteristics of plastics include flexibility and resiliency, it would have been obvious that the flap (15) of Simpson et al. being made from plastic is "...capable of allowing the flap to display bias towards the seal surface."

As to claim 50, while Simpson et al. is silent as to the relative surface areas of the fixed and free portions of flap (15), it is submitted that the particular relative amounts of

the fixed and free portions can be arrived at through mere routine obvious experimentation and observation with no criticality seen in any particular relative amounts.

As to claim 51, the flange against which the flap is secured in Simpson et al. (fig.2) is illustrated as being the same 360 degrees around the valve seat.

As to claim 52, given the downward orientation of the mask body (1,2) of Simpson et al. (fig.1) and given that any exhaled air must pass outward between the valve flap (15) and the body of the mask, it stands to reason that exhaled air will follow a path which is generally parallel to the upper surface of the body of the mask which itself is downwardly oriented as illustrated in fig.1. Therefore, exhaled air is deflected downwardly during use of the mask of Simpson et al..

As to claim 53, the mask body of Simpson et al. is cup shaped and includes at least one shaping layer and a filtration layer (page 1, lines 108-123). Simpson et al. (page 1, line 116) disclose that the shaping layer may be located on one or both sides of the filtration layer. One or both sides would include being located outside of the filtration layer.

As to claims 54-56, while Simpson et al. do not address the particular volume of a wearer's exhalation exiting the exhalation valve (12), it is submitted that since the exhalation valve (12) is expressly disclosed as opening in response to a wearer's exhalation, it would have been obvious that the valve would remain opened as long as a wearer is exhaling which would enable most if not all of the volume including 60-73% of gas exhaled by a wearer to pass through valve (12) of Simpson et al..



As to claim 58, since the mask body (1,2) of Simpson et al. is angled downwardly when positioned on a wearer's face, the valve (fig.2) mounted in cantilever fashion on mask body (1,2) of Simpson et al. is positioned substantially opposite a wearer's mouth (fig.1).

As to claim 60, the orifice (16) of Simpson et al. does not wholly correspond to the shape of the seal surface inasmuch as the boundaries of the orifice are set at a distance within the seal surface.

As to claim 61, the valve cover of Shindel has an opening (13) that is disposed directly in the path of fluid flow when the free portion of the flexible flap is lifted from the seal surface during an exhalation.

As to claim 62, the opening (13) in the valve cover of Shindel is approximately parallel to the path traced by the second end of the flexible flap during its opening and closing.

As to claim 63, the valve cover of Simpson et al. as modified by Shindel and its opening direct exhaled fluid flow downwards when the mask is worn on a person (see fig.1 of Simpson et al.).

As to claim 64, the valve cover of Shindel includes fluid-impermeable sidewalls (11).

As to claim 65, the opening (13) in the valve cover of Shindel is at least the size of the orifice in the valve seat.

Claim 66 is substantially equivalent in scope to claim 68 and is included in Simpson et al. as modified by Soderberg and Shindel for the reasons set forth above with respect to claim 68. Soderberg (page 4, lines 20-21) teach the valve flap is pressed towards the

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seal surface in substantial abutting relationship therewith under any orientation of the valve when a fluid is not passing through the orifice.

As to claims 67,69, the valve cover of Shindel is secured to the valve seat by friction fit (11,15) to a wall (5,8) of the valve seat.

As to claim 70, Shindel (figs.3 and 4) illustrates the valve cover (10) having fluid impermeable sidewalls that support a fluid impermeable ceiling, and wherein the valve cover has an opening (12) that is disposed directly in the path of fluid flow, the fluid impermeable sidewalls and the ceiling and the positioning of the opening in the valve cover causing the fluid flow to be directed downwardly away from the wearer's eyes during an exhalation when the mask is worn by a person.

As to claims 71,72,75, Shindel teaches the flexible flap being mechanically clamped between the surface on the valve cover and the flap retaining surface col.2, lines 51-55 and the flap retaining surface is not disposed in the path of the exhale flow stream and outside the region defined by the plurality of openings (#16 of Simpson et al.).

As to claim 73, Simpson et al. teach a plurality of openings (16) disposed within the orifice beneath where the flexible flap (15) is mounted to the valve seat when viewing the filtering face mask from the front in an upright position.

As to claim 74, Simpson et al. (fig.2) as modified by Shindel provide an exhalation valve that opens responsive to a wearer's exhalation (page 2, lines 37-42). Accordingly, the exhalation valve constitutes a structure that is fully capable of performing the recited function of being a primary passage for a wearer's exhaled air.

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As to claims 76-77, the flap retaining surface of Simpson et al. (fig.2) and Shindel (fig.2) illustrate the flap retaining surface to be spaced at some undisclosed distance from the nearest orifice portion. The particular distance constitutes a results effective variable and as such can be arrived at through mere routine obvious experimentation and observation. For example, a mask for children may have a smaller distance between the flap retaining surface and nearest portion of the orifice than in a mask for adults due to the elements that make up such a mask being generally smaller for children. Appellant has provided no criticality for any particular distance including 1-3.5mm; therefore, it is submitted that other distances would have performed equally well including the distances illustrated in Simpson et al. and Shindel.

As to claim 78, each of Simpson et al.(fig.2), Soderberg (figs.2-3) and Shindel (fig.2) illustrates the peripheral edge of the free end of the valve flap corresponding to the shape of the seal surface where the free portion makes contact therewith.

As to claims 79-82, the function of the valve flap in Simpson et al. as modified by Soderberg and Shindel remains the same regardless of the dimensions of the valve flap; therefore, the particular dimensions of the valve flap in Simpson et al. as modified by Soderberg and Shindel constitute optimizable results effective variables and as such can be arrived at through mere routine obvious experimentation and observation. Appellants have provided no criticality for the dimensions of the valve flap and as such the size of the valve flap in Simpson et al. as modified by Soderberg and Shindel would have performed equally well.

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3. Claims 37-49,83-87 are rejected under 35 U.S.C. 103(a) as being unpatentable over Simpson et al. ('516) in view of Soderberg (EP 0 252 890) and Shindel ('277) as applied to claims 68,34-36,50-56,58,60-75 above, and further in view of Cover ('183).

The difference between Simpson et al. as modified by Soderberg and Shindel and claim 37 is the flexible flap having a curved profile when viewed from a side elevation.

Cover (page 2, col.1, lines 3-6, lines 15-17, lines 22-33, lines 48-51) teaches an exhalation valve flap (23) when secured to the valve seat (17) at its fixed portion has a curved profile when viewed from a side elevation (figs.1,2,4) for the purpose of improving the closing action of the valve flap, improving the retention of the valve flap in effective registration with the apertures of the valve seat and causing the valve flap to function more efficiently.

It would have been obvious to modify the shape of the valve seat of Simpson et al. to have a curved profile when viewed from a side elevation because it would have improved the closing action of the valve flap, improved the retention of the valve flap in effective registration with the apertures of the valve seat and caused the valve flap to function more efficiently as taught by Cover.

As to claims 38-39, the flap (15) of Simpson et al. is disclosed as being made from plastic and/or rubber. The physical characteristics of plastic and rubber include elasticity. Consequently, the particular material from which the valve flaps of Simpson et al. are made can be arrived at through mere routine obvious experimentation and observation with no criticality seen in any particular elasticity of such a material. One of ordinary skill would recognize the need for routine experimentation and observation in

an effort to arrive at a range of elasticities of such valve flaps, which would be open and close responsive to a wearer's exhalation and cessation of exhalation in a manner which protects the wearer.

As to claims 40 and 41, the degree of seal between the valve flap and valve sealing surface of Simpson et al. can be arrived at through mere routine obvious experimentation and observation with no criticality seen in any particular degree of seal including one meeting the standards as set forth in 30CFR 11.183-2, July 01, 1991. Further, it stands to reason that one of ordinary skill would strive to make a face mask in accordance with at least minimum current government standards of operation and including a stress relaxation sufficient to keep the flexible flap in an abutting relationship to the seal surface under any static orientation for 24 hrs. at 70 degrees centigrade.

As to claims 42-46,48,49, the particular dimensions, the particular material including the hardness of the material of the flexible flap (15) of Simpson et al. can be arrived at through mere routine obvious experimentation and observation with no criticality seen in any particular dimensions nor in any particular constituency. One of ordinary skill would have recognized that the particular dimensions and the particular material including hardness of the material would have been dependent upon the airflow requirements of a group of wearers, that is, an adult would require a mask and valve of a size and material that is capable of handling respiratory airflows typical of adults whereas a child or an adult with a compromised respiratory system would require a mask and valve of a size and material that is capable of handling lesser respiratory airflows.

As to claim 47, the one free portion of the flexible flap of Simpson et al. as further modified by Cover (figs.1-4,6) has a profile that comprises a curve when viewed from the front, which curve is cut to correspond to the general shape of the seal surface.

As to claim 83, Cover (figs.1-4,6) teaches the flexible flap being curved over the orifice.

As to claim 84, Simpson et al. (figs.1 and 2) illustrate a plurality of orifices (16) disposed beneath where the flexible flap is mounted to the valve seat when viewing the filtering face mask from the front in an upright position.

As to claim 85, Simpson et al. (figs.1 and 2) illustrate a plurality of orifices (16) through which a wearer's exhaled air passes during exhalation.

As to claim 86, Simpson et al. (fig.2) illustrate the flap retaining surface (#17) being outside the region defined by the plurality of openings (16).

As to claim 87, the flap retaining surface of Simpson et al. (fig.2) and Shindel (fig.2) illustrate the flap retaining surface to be spaced at some undisclosed distance from the nearest orifice portion. The particular distance constitutes a results effective variable and as such can be arrived at through mere routine obvious experimentation and observation. For example, a mask for children may have a smaller distance between the flap retaining surface and nearest portion of the orifice than in a mask for adults due to the elements that make up such a mask being generally smaller for children. Appellant has provided no criticality for any particular distance including 1-3.5mm; therefore, it is submitted that other distances would have performed equally well including the distances illustrated in Simpson et al. and Shindel.

## **NEW GROUND(S) OF REJECTION**

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 41 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. No amendment may introduce new matter into an Application after its filing date. MPEP §608.04

As to Claim 41, Appellant is advised the incorporation by reference of 30 C.F.R. §11.183-2 is improper and renders the claim indefinite because it is unclear whether this limitation is apart of the of the claimed invention. MPEP § 2173.05(d). While section (b) of 37 CFR 1.57 states that clear identification of the publication is necessary and Appellant has clearly identified the publication, there are other sections of the same rule that set forth requirements that must also be met. Essential subject matter may be incorporated by reference to U.S. patents or U.S. patent application publications only (37 CFR 1.57(c)). In the present instance, the subject matter in question does not meet this requirement because it is incorporated by reference to a non-patent publication. Applicant can overcome this condition by canceling the claim reciting the C.F.R. rule. Thereby, making the subject matter in question non-essential subject matter. No amendments to the specification would be necessary in this case because non-

essential subject matter may be incorporated by reference to non-patent publications (37 CFR 1.57(d)).

### **(10) Response to Argument**

#### **Summary of Claimed Subject Matter**

Examiner would like to bring to the attention of the Appellant a minor informality. Specifically, on page 4 and page 5 Appellant lists a tabular analysis for independent claim 66. From a close reading of the Appeal Brief, Examiner believes the tabular analysis listed on page 5 should be listed as independent claim 68.

#### **Grounds of Rejection on to be Reviewed on Appeal**

##### ***First Grounds of Rejection***

Appellant's arguments have been fully considered but they are not persuasive. Appellant asserts: 1) the combination of the prior art references does not teach or fairly suggest the holding of a flexible flap against the flap retaining surface in a location and position relative to the seal surface such that the flap is pressed towards the seal surface in a substantially abutting relationship therewith, and 2) the device of Soderberg does not teach or fairly suggest the use of a valve cover and a flap-retaining surface that is located and positioned relative to the seal surface such that the flap is pressed towards the seal surface in an abutting relationship with it. Examiner respectfully disagrees with Appellant's assertions.



Regarding Appellant's first assertion, the combination of the prior art references does teach a flexible flap being held against a flap-retaining surface in a location relative to the seal surface. Specifically, Simpson teaches a retaining ring (17) which engages the edge portion of the flapper valve (13) for providing an effective seal (Figure 2 and Page 2, Lines 46-50).

Regarding Appellant's second assertion, the combination of the prior art references does teach a valve cover in combination with a flap-retaining surface for pressing the flap towards the seal surface. As previously addressed, Simpson teaches a flap-retaining surface (17) for providing an effective seal against the flapper valve (15). (Figure 2 and Page 2, Lines 46-50). Simpson is modified by Soderberg to teach additional structural modifications to the flapper valve to enable a firm seal for maintaining the sealing engagement between the exhalation valve and the valve seat (Page 4, Lines 17-23). The combination of Simpson as modified by Soderberg is further modified by Shindel to teach the use of a valve cover for securing the valve and providing protecting the valve arrangement (Column 2, Lines 59-66). Intrinsically, the combination of prior art references teaches a valve assembly having a valve cover wherein the flap-retaining surface is within an abutting relationship with the seal surface. Comparatively examining the invention of the combination with Appellant's invention (Figure 8), the difference lies within the manner in which the valve cover is abutted to the flap-retaining surface. The invention of the combination teaches the abutment of the valve cover periphery around the flap-retaining surface (Shindel, Figure 2); while Appellant's invention discloses abutment of the valve cover around the periphery of the

flap-retaining surface and on the most distal portion of the valve. However, as the current claim limitations do not suggest the specific structural orientation as shown in Figure 8, the rejection of the combined prior art references meets the claim limitations. Further, Appellant is advised, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

In conclusion, because of the aforementioned reasons, the rejection of claims 68, 34-36, 50-56, 58, 60-75, and 76-82 has been maintained.

#### *Second Grounds of Rejection*

Appellant's arguments have been fully considered but they are not persuasive. Appellant asserts: 1) Cover does not teach or fairly suggest a structure that would improve the closing action of a cantilever flap, 2) Cover does not teach or fairly suggest the mounting of hardware should be placed at one end of the flap, 3) Cover does not teach or fairly suggest the use of a valve cover and a flap-retaining surface that is located and positioned relative to the seal surface such that the flap is pressed towards the seal surface in an abutting relationship, 4) the application of Cover is not obvious as references Simpson and Soderberg were filed many years after Cover, and 5) the historical usage of button valves in filtering masks does not provide evidence of nonobviousness of Appellant's invention as the development of flapper valves

revolutionized the changed the state-of-the-art. Examiner respectfully disagrees with Appellant's assertions.

Regarding Appellant's first assertion, Cover teaches the curved profile enables the valve to move more efficiently (Page 2, Column 1, Lines 3-6, Lines 15-17, Lines 22-33 and Lines 48-51). Further, in regards to Appellant's use of "cantilever flap", it should be noted that this claim limitation is not found within the current claim listing.

Regarding Appellant's second and fifth assertions, Appellant's arguments are not commensurate with the scope of the claims. Appellant's current claim listing does not require or fairly suggest the structural orientation of the mounting hardware placed at one end of the flap or known terms of art, such as: a cantilever flap, a flapper valve, or a reed valve. Therefore, Examiner has given the claims the broadest reasonable interpretation.

Regarding Appellant's third assertion, Appellant is directed to the aforementioned section entitled "First Grounds of Rejection" under the headings of "Response to Arguments"- "Grounds of Rejection to be reviewed on Appeal". Within this section, Examiner comparatively analyzes the differences between Appellant's claimed invention, Appellant's invention (Figure 8), and the combination of prior art.

Regarding Appellant's fourth assertion, Appellant is advised the ability of a reference to be combined is not a function of the dates in which the reference application(s) were filed, but rather whether a person of ordinary skill in the art would have been aware of the technological advancement at the time in which the instant application was filed.

In conclusion, because of the aforementioned reasons, the rejection of claims 37-49 and 83-87 has been maintained.

Affidavit of Brian S. McGinley

The affidavit under 37 CFR 1.132 filed July 9, 2001 in application 08/240,877 is insufficient to overcome the rejection of claims 34-56, 58, and 60-87 based upon Simpson/Soderberg/Shindel under 35 U.S.C. 103 as set forth in the last Office action because:

Applicant refers to an affidavit or declaration filed in the prior application. Affidavits or declarations, such as those submitted under 37 CFR 1.130, 1.131, and 1.132, filed during the prosecution of the prior application do not automatically become a part of this application. Where it is desired to rely on an earlier filed affidavit or declaration, the applicant should make the remarks of record in this application and include a copy of the original affidavit or declaration filed in the prior application.

Therefore, the affidavit of Brian S. McGinley has not been entered.

Declaration of John L. Bowers

The declaration under 37 CFR 1.132 filed July 8, 2002 is insufficient to overcome the rejection of claims 34-56, 58, and 60-87 based upon Simpson/Soderberg/Shindel under 35 U.S.C. 103 as set forth in the last Office action because:

It states that the claimed subject matter solved a problem that was long standing in the art. However, there is no showing that others of ordinary skill in the art were

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working on the problem and if so, for how long. In addition, there is no evidence that if persons skilled in the art who were presumably working on the problem knew of the teachings of the above cited references, they would still be unable to solve the problem. See MPEP § 716.04.

Regarding declaration of John L. Bowers, the declaration refers to the rejection combination of Simpson (GB 2072516) in view of McKim (US 3,191,618) rather than instant rejection combination of Simpson in view of Soderberg and Shindel. Therefore, the declaration of John L. Bowers does not address the current issues at hand and appears to have been incorporated from a previously filed application.

In view of the foregoing, when all of the evidence is considered, the totality of the rebuttal evidence of nonobviousness fails to outweigh the evidence of obviousness.

#### **(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

This examiner's answer contains a new ground of rejection set forth in section **(9)** above. Accordingly, appellant must within **TWO MONTHS** from the date of this answer exercise one of the following two options to avoid *sua sponte* **dismissal of the appeal** as to the claims subject to the new ground of rejection:

(1) **Reopen prosecution.** Request that prosecution be reopened before the primary examiner by filing a reply under 37 CFR 1.111 with or without amendment, affidavit or other evidence. Any amendment, affidavit or other evidence must be relevant to the new grounds of rejection. A request that complies with 37 CFR 41.39(b)(1) will be entered and considered. Any request that prosecution be reopened will be treated as a request to withdraw the appeal.

(2) **Maintain appeal.** Request that the appeal be maintained by filing a reply brief as set forth in 37 CFR 41.41. Such a reply brief must address each new ground of rejection as set forth in 37 CFR 41.37(c)(1)(vii) and should be in compliance with the other requirements of 37 CFR 41.37(c). If a reply brief filed pursuant to 37 CFR 41.39(b)(2) is accompanied by any amendment, affidavit or other evidence, it shall be treated as a request that prosecution be reopened before the primary examiner under 37 CFR 41.39(b)(1).

Extensions of time under 37 CFR 1.136(a) are not applicable to the TWO MONTH time period set forth above. See 37 CFR 1.136(b) for extensions of time to reply for patent applications and 37 CFR 1.550(c) for extensions of time to reply for ex parte reexamination proceedings.

Respectfully submitted,


A handwritten signature in black ink, appearing to read "Annette Dixon", is written over the printed name.

Annette Dixon

Examiner, Art Unit 3771

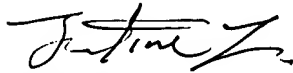
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**A Technology Center Director or designee must personally approve the new ground(s) of rejection set forth in section (9) above by signing below:**



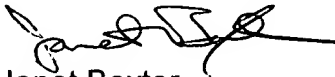
**FREDERICK R. SCHMIDT  
DIRECTOR  
TECHNOLOGY CENTER 3700**

Conferees:



Justine Yu

Supervisory Primary Examiner, Art Unit 3771



Janet Baxter

Training Quality Assurance Specialist, Technology Center 3700